Supreme Court, U.S.
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No. 93-94

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROBERT F. BISER,

Petitioner,

v.

TOWN OF BEL AIR, MARYLAND, CAROL DEIBEL, EDSEL A. DOCKEN, SR., JAMES M. DECKER, JOHN E. YANTZ, DONALD YOUNG, AND D. DAVID RANEY, JR.

Respondents.

Petition For Writ Of Certiorari to The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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33 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in precluding all challenges to arbitrary and capricious land-use regulatory actions under the due process clause, by holding that the existence of discretion in determining whether to grant a special exception prevents the existence of a protectible property interest.

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PETITION FOR WRIT OF CERTIORARI

Robert F. Biser respectfully petitions the Court for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in Biser

v. Town of Bel Air, Maryland, et al., No. 92-1675, entered on April 2, 1993.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 991 F.2d 100, and is attached to this petition as Appendix A. The opinion of the district court is unreported, and is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

Petitioner, Robert F. Biser, brought this action in the United States District Court for the District of Maryland, claiming damages under 42 U.S.C. §1983 for the alleged

deprivation of his property without due process by the Town of Bel Air, Maryland and six of its officials and employees. The basis of his complaint was the arbitrary denial of a special exception permit which would have permitted completion of buildings under construction by Biser. Jurisdiction was based on 28 U.S C. §1343. The complaint also asserted two pendent state law claims. The district court concluded that the claim asserted under section 1983 failed to state a claim on which relief could be granted and granted respondents' motion to dismiss. It dismissed the state law counts for lack of jurisdiction. The Fourth Circuit affirmed this disposition.

According to the complaint, Biser owned a tract of real property located in the Town of Bel Air, which was situated in a district designated "R-2" (General Residence) district under the Town Zoning Ordinance. The Zoning Ordinance allows the conversion of a dwelling into professional office space with certain provisos, upon approval by the Town's Board of Appeals as a special exception.

Petitioner wished to build two office buildings on the property. To determine if the project was permissible under the special exception procedure, he met with respondent Deibel, the Town Director of Planning and Community Development, in August 1988, to discuss his planned use of the property. After review of Biser's preliminary plans, Deibel advised Biser about how to proceed to obtain approval.

Biser then presented his plan to the Board of Appeals at its September, 1988 meeting. Biser advised the Board of his desire to ascertain whether any impediments existed before proceeding with construction. The Board did not object to his plans, and approved necessary variances based on those plans. Based on the Board's acquiescence, Biser completed plans for the buildings, and applied for building permits in May, 1989. The application and accompanying plans showed that the buildings were designed solely for commercial use. The permits were issued in June, 1989. On the face of the permits, the phrase "commercial office buildings" was stricken and the

term "dwellings" was inserted. Otherwise the plans were approved as submitted, and Biser began construction.

In August, 1989, after substantial construction of the buildings, Biser sought approval of the project's underground storm water management facility, wishing to complete the facility before the winter months. He was advised by town employees that this approval would not be granted until the Board had granted the special exception for office buildings. Deibel informed Biser that he could apply for special exception approval as long as the building was "under roof" and the windows were installed prior to the Board of Appeals hearing. Biser completed the necessary construction and presented his application to the Board at its meeting of September 26, 1989. He explained that the project was the same that was presented to the Board in 1988. The Board did not rule on the application at that meeting.

On September 28, 1989, two days after the hearing, a stop work order was issued. The order stated that the

structures would have to be made suitable for residential use to comply with Building Code requirements. To avoid delay Biser installed the bathroom and kitchen facilities necessary to make the structures comply with the building code, and the stop work order was lifted on October 16, 1989.

Biser's application was again considered by the Board on October 24, 1989. At that meeting, Biser demonstrated his compliance with the stop work order and stated that, in reliance on the prior representations of the Board and Mrs. Deibel, he had expended substantial amounts of money and time constructing the buildings. The Board denied the request for a special exception.

Biser filed an appeal to the Circuit Court for Harford County. In an opinion dated January 26, 1990, the Circuit Court concluded that the Town and the Board of Appeals were estopped from denying the approval because of Biser's reliance on their representations regarding the procedure for obtaining a special exception. The court ruled that the zoning ordinance

did not require the building to be complete before conversion. Holding that undue hardship would be placed on Biser if the exception were denied, the court directed the Board to grant the special exception.

According to the complaint, after the Circuit Court's decision, respondents imposed additional delays upon the necessary approvals for the special exception, fashioning several new requirements that were inconsistent with prior approvals. These actions resulted in additional delays of several months. A final use and occupancy permit was issued on October 16, 1990.

The complaint alleged that as a result of respondents' conduct, Biser was subjected to substantial expenses, loss of opportunity to lease the buildings, loss of good will and prospective income, as well as emotional and mental anguish and distress. The complaint alleged that respondents' conduct was arbitrary and capricious, without any rational basis, and not reasonably related to any permissible governmental

objective.

Respondents moved to dismiss for failure to state a claim on several bases. The district court rejected respondents' assertion that the complaint insufficiently alleged an entitlement that qualified for due process protection. It also rejected defendants' claim that the action was barred by Parratt v. Taylor, 451 U.S. 527 (1981), because the claims was based on substantive due process, making Parratt, which applies to procedural due process claims, irrelevant. It held, however, that the conduct alleged by Biser did not rise to the level of a due process violation, and granted the motion to dismiss.

The Court of Appeals affirmed. It held that Biser had no property interest which qualified for due process protection, because the ordinance empowering the Board to consider special exceptions gave the Board discretion in deciding whether to grant the application for a special exception.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's standard for determining whether a property interest exists effectively forecloses the possibility of a challenge to any land use action under the due process clause. Motivated perhaps by the understandable reluctance of federal courts to sit as zoning boards of appeals, the court purposefully fashioned a rule that closes the courthouse door to an entire group of litigants - property owners affected by land use control action. The sweeping and pervasive nature and effect of the court's rule calls for review.

Furthermore, the subject matter of this case - federal court review of state land-use control decisions - has generated a prolific number of decisions among the circuits, with a wide degree of divergence in the approach of the courts to the issues that such disputes pose. The definition of a property interest is one of the aspects of this conflict. Thus, review of this case presents an opportunity to provide guidance on an important subject affecting a great number of litigants and a substantial

amount of litigation.

The Fourth Circuit's conclusion that Biser possessed no cognizable property interest was based on a standard that the court adopted in Gardner v. Baltimore Mayor and City Council, 969 F.2d 63 (4th Cir. 1992). In that case, the court decided that

> "Whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest.... Under this standard, a cognizable property interest exists 'only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.'"

969 F.2d at 68, quoting RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 918 (2d Cir. 1989). The court made clear that its intent in adopting this standard was to relegate land-use disputes to state courts.

The court purported to base this standard upon Board of Regents v. Roth, 408 U.S. 564 (1972), where this Court, stating that property interests protectible under the due process clause are created and defined "by existing rules or understandings that stem from an independent source such as state law," drew the line as follows:

> "To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

408 U.S. at 577.

Several facets of this analysis are noteworthy. First, the typical legislative enactment under which a land-use authority such as the Board of Appeals acts empowers the authority to consider various factors. Since the purpose of a special exception procedure is to confer flexibility not otherwise inherent in the zoning ordinance, these procedures uniformly imply a measure of discretion. 3 Rathkopf, The

Law of Zoning and Planning §41.11 at 41-49 (4th ed.). Provisions similar in many respects exist in virtually all zoning enactments. See Williams, American Land Planning Law §18.01, §§148.03-148.05 (1988 rev.).

Therefore, a standard that holds that a property interest may never arise where the exercise of discretion is theoretically possible virtually precludes due process review of any action by an authority so empowered. As the Sixth Circuit commented, discussing the Second Circuit's adoption of the same standard, "[t]he bottom line of this approach is even more hostile to federal zoning plaintiffs than the First Circuit approach [which applies an extremely deferential standard of review]." Pearson v. City of Grand Blanc, 961 F.2d 1211, 1218 (6th Cir. 1992).

Second, the court's characterization of such legislation is not a fair interpretation. The Maryland courts, for example, have not interpreted such enactments as making the Board's grant of an exception the equivalent of the unilateral

dispensation of a privilege. See, e.g., People's Counsel v. Mangione, 85 Md. App. 738, 584 A.2d 1318 (1991). The Fourth Circuit's incantation of the word "discretion" belies the reality of how such standards are actually applied under state law. That artificiality in turn supports an unnecessarily crabbed definition of property interest.

Third, such a standard is actually contrary to Board of Regents v. Roth, supra. "Legitimate claims of entitlement" may be differentiated from "unilateral expectations" without adopting a standard under which all facts other than the scope of the statutory authority are irrelevant. Indeed, the definition in Roth itself implies that property interests can arise from a variety of sources, referring as it does to "existing rules or understandings that stem from an independent source such as state law." 408 U.S. at 577. (emphasis added). This Court emphasized in Perry v. Sindermann, 408 U.S. 593 (1972), that property interests "are not limited by a few rigid, technical forms." 408 U.S. at 601.

As this case illustrates, there are many factors pertinent to whether an individual's claim transcends unilateral expectation other than the empowering statute itself. The denial of a special exception did not occur in a vacuum; it occurred after petitioner had virtually completed his buildings in reliance on approvals from the local officials, including preliminary approvals by the Board of Appeals itself, at a hearing where petitioner outlined his plans and made pellucid his desire to proceed with the buildings only if he could obtain the special exception. Yet the Fourth Circuit essentially held that the only relevant fact was the ordinance empowering the Board, disregarding completely the factual setting of the controversy. That analysis is not mandated by, and is not faithful to, Roth.

Finally, the court's treatment of this issue is one example of the extraordinary divergence of approach among the circuits in these cases. As the court remarked in Pearson v. City of Grand Blanc, supra, 961 F.2d 1211: "The lack of

uniformity among the circuits in dealing with zoning cases of the "arbitrary and capricious substantive due process' category is remarkable." 961 F.2d 1217. As that opinion's review of the cases indicates, not only is there divergence, but there is a tremendous amount of such litigation that reaches the circuits. 961 F.2d at 1217-1219. See also Levinson, Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process, 16 Dayton L. Rev. 313, 326-327 (1991).

The Fourth Circuit's definition of a property interest, which has also been adopted by the Second, Tenth and Eleventh Circuits, conflicts with the Sixth Circuit, which "has implicitly recognized that mere ownership of property subjected to zoning is a property interest sufficient to invoke due process." Pearson, 961 F.2d at 1218 n.29. By focusing on the permit itself as the subject of the due process review, this rule masks the impact of such action upon the underlying property interest itself.

Moreover, the Fourth Circuit explicitly rejected the conclusion of the First Circuit in Roy v. City of Augusta, Maine, 712 F.2d 1517 (1st Cir. 1983) that the effect of the respondents' conduct might supply a property interest.

The divergence exemplified by these conflicts mandates adoption of a single standard. The definition of a property interest should be developed for the guidance of the lower courts. The standard adopted below, which removes an entire class of property interests from the protection of the due process clause, should be rejected. Accordingly, the Court should grant the writ.

CONCLUSION

For the reasons stated, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT F. BISER

Plaintiff-Appellant,

v. No. 92-1675

TOWN OF BEL AIR; CAROL DEIBEL; EDSEL A. DOCKEN, SR.; JAMES M. DECKER; JOHN E. YANTZ; DONALD YOUNG; D. DAVID RANNEY, JR.,

Defendants-Appellees.

ROBERT F. BISER

Plaintiff-Appellant,

v. No. 92-1732

TOWN OF BEL AIR; CAROL DEIBEL; EDSEL A. DOCKEN, SR.; JAMES M. DECKER; JOHN E. YANTZ; DONALD YOUNG; D. DAVID RANNEY, JR.,

Defendants-Appellees.

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-91-1785-Y)

Argued: February 2, 1993

Decided: April 2, 1993

Before WILKINSON and WILKINS, Circuit Judges,
and PAYNE,
United States District Judge for the Eastern
District of Virginia,
sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Wilkins and Judge Payne joined.

COUNSEL

ARGUED: W. Michel Pierson, PIERSON, PIERSON & NOLAN, Baltimore, Maryland, for Appellant. Carol Brenick O'Keeffe, LEVAN, SCHIMEL, BELMAN & ABRAMSON, P.A., Columbia, Maryland, for Appellees. **ON BRIEF**: Robert H. Levan, LEVAN, SCHIMEL, BELMAN & ABRAMSON, P.A., Columbia, Maryland, for Appellees.

OPINION

WILKINSON, Circuit Judge:

This case arises from a local zoning dispute in Bel Air, Maryland. Appellant Robert Biser claims that the Town of Bel Air deprived him of substantive due process when it denied him a "special exception" that would have permitted him to construct two commercial office buildings in an area zoned for residential use. The Circuit Court for Harford County, Maryland held that the Town was equitably estopped from denying Biser his special exception, which that court ordered the Town to grant. After completing his office buildings, Biser filed this suit under 42 U.S.C. §1983, claiming $1 million in damages from the Town's delay in granting the special exception. The district court dismissed the complaint for failure to state a claim. We believe that neither the relevant zoning laws nor the ruling of the Circuit Court of Harford County was sufficient to confer a cognizable property interest upon Biser. We thus agree with the district court that

this local land use dispute does not belong in federal court.

I.

The complaint alleges these facts. Robert Biser owns a tract of real property located at the corner of Vale Road and Rockspring Avenue in the Town of Bel Air, Maryland. That area has been zoned "R-2" (General Residence), restricting buildings in that area to residential use.

Local ordinances provide for commercial office use in residential areas under certain conditions, if the local Board of Appeals approves a special exception.[1] Maryland law

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[1]The local ordinance provides, subject to the approval of the Board of Appeals, for

> conversion of a dwelling or part thereof into the office or studio of one or more physicians, surgeons, dentists, musicians, artists, lawyers, architects, engineers, teachers, insurance agents, real estate agents, photographers, accountants, or other professionals; provided that the exterior residential appearance or the building shall be retained, that no floodlighting shall be used and adequate off-street parking areas shall be provided to accommodate all personnel and patrons. The Board of Appeals may impose

authorizes the Board of Appeals to decide appeals from decisions by administrative officials as well as to grant special exceptions from certain ordinances. Md. Ann. Code art. 66B, §4.07(d).

In August 1988, Biser contacted Carol Deibel, Director of Planning and Community Development in Bel Air. He sought her assistance in obtaining a special exception from the residential zoning restrictions. Deibel reviewed Biser's preliminary plans for two office buildings and informed him that his plans required setback variances. Deibel suggested that Biser apply for the setback variances, obtain building permits, construct the buildings, and then request the special exception. Deibel informed Biser that the buildings would have to be built before they could be approved for a special

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> further conditions pursuant to Section 16.0443 of this Ordinance in order to protect the neighborhood, adjacent properties and community.

Town of Bel Air Zoning Ordinance No. 208, art. 7.06.

exception.

Biser presented his plans at a meeting of the Board of Appeals on September 27, 1988. He informed the Board of his development plans and his desire to ascertain whether there were any impediments to those plans. The Board expressed no objections to Biser's plans and approved the setback variances.

Biser then submitted his completed building plans with his applications for building permits to the Town's Assistant Planner. The building permits were approved on June 27, 1989, but only after the references to "commercial office buildings" in the applications were struck out and replaced with "dwellings."

After construction had begun, Biser sought approval in August 1989 for his storm water management plans. Town employees informed him that the storm water management plans could not be approved until the Board granted a special exception. Biser again contacted Deibel to ascertain what would be required to secure a special exception. Deibel

informed Biser that he could apply for a special exception as long as the buildings were "under roof" and their windows had been installed. Biser completed this construction and applied for a special exception at the Board's meeting on September 26, 1989. The Board did not issue a decision at this meeting.

Two days later, the Town's Superintendent of Public Works issued a "stop-work" order. The order stated that the buildings did not comply with the Building Code's requirements for single family dwellings. Biser protested this order without success. In order to avoid further delays, he installed the kitchen and bathroom facilities necessary to comply with the order. The order was lifted on October 16, 1989.

The Board met again on October 24, 1989 to consider Biser's application for a special exception, which the Board denied. Biser appealed the denial to the Circuit Court for Harford County. The Circuit Court found that the ordinance authorizing special exceptions was ambiguous as to whether

use and occupancy permits must be presented before the special exception for conversion of a dwelling to office use could be granted. That court further found that Biser relied to his detriment on the Town's approval of his building permits, and went on to hold that the Town was equitably estopped from denying Biser his special exception. The Circuit Court remanded to the Board with instructions to grant the special exception. The Town complied with that order forthwith.

After some further delay in the permitting process, Biser completed his office buildings. He then filed this suit under 42 U.S.C. §1983, claiming that he had been denied due process by the Town's delay in granting his special exception. Biser also made two state law claims based on the same facts. The district court dismissed with prejudice the federal count for failure to state a claim, and declined to exercise pendent jurisdiction over the state claims, which the court dismissed without prejudice. Biser appeals from the complaint's

dismissal. The Town cross-appeals, contending that the state claims should have been dismissed with prejudice.

II.

In order for Biser to state a substantive due process claim, he must first demonstrate that he possesses a "cognizable property interest, rooted in state law," in the lost benefit. See Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983). We do not believe that Biser held a property interest in the special exception before it was granted by the Board. A property interest requires more than a "unilateral expectation" that a permit or license will be issued; instead, there must be a "legitimate claim of entitlement." See Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In applying this standard of entitlement, we have held that if a local agency has "[a]ny significant discretion" in determining whether a permit should issue, then a claimant has no legitimate entitlement and, hence, no cognizable property interest. Gardner v. Baltimore Mayor & City Council, 969 F.2d 63, 68

(4th Cir. 1992).

Here the Board of Appeals had significant discretion in deciding whether to grant Biser's application for a special exception. In making its decision, the Board had to determine whether granting the exception "would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions or would jeopardize the lives or property of people living in the neighborhood." Town of Bel Air Zoning Ordinance, No. 208 art. 16.042. It is difficult to imagine a more flexible standard. Moreover, the ordinance requires the Board to consider eighteen separate factors in making this determination. Id. See also Heath v. Mayor and City Council of Baltimore, 49 A.2d 799, 803 (Md. 1946) (noting discretion of local Boards of Appeals in granting special exceptions). In every respect then, the Board of Appeals possessed significant discretion under Gardner in deciding whether to grant special exceptions. Biser had only a unilateral expectation that he would receive the

special exception. He possessed no legitimate claim of entitlement, and thus no property right cognizable under the due process clause. The fact that Biser believes that the Board acted arbitrarily on his application does nothing to change the fact that he was not deprived of any entitlement or right.

III.

Biser contends, however, that the Circuit Court for Harford County created a state-law property interest when it held that the Board of Appeals was equitably estopped from denying him the special exception.

We disagree. Under Maryland law, equitable estoppel of a municipal corporation requires (1) an official act taken within the scope of authority; (2) an ambiguous stature or ordinance; and (3) detrimental reliance by a third party. See Permanent Fin. Corp. v. Montgomery County, 518 A.2d 123, 127-29 (Md. 1986). Equitable estoppel prevents "a defendant from relying upon a right of property, of contract or of remedy both at law or in equity." Kline v. Lightman, 221 A.2d 675,

684 (Md. 1966). Here the Board was estopped from asserting its legal right to deny the special exception. Estoppel does not, however, give rise to any affirmative duties. Leonard v. Sav-A-Stop Services, Inc., 424 A.2d 336, 339-40 (Md. 1981).

A subsequent order by a court of equity estopping a municipality from relying on its legal right does not represent a legitimate claim of entitlement. In order to justify substantive due process protection, the legal right to a permit must exist before the local agency denies the permit application--the claim of entitlement must come from "an existing legislative or administrative standard." Dean Tarry Corp v. Friedlander, 826 F.2d 210, 213 (2d Cir. 1987) (emphasis added). Equitable estoppel does not recognize a pre-existing legal right; rather, estoppel bars a defendant from asserting a legal right that it would otherwise be entitled to enforce, based on that party's conduct. Fitch v. Double "U" Sales Corp., 129 A.2d 93, 101 (Md. 1957) ("Equitable estoppel operates to prevent a party from asserting his rights

under a general technical rule of law, when that party has so conducted himself that it would be contrary to equity and good conscience to allow him to do so."). Arbitrary conduct standing alone does not create a legitimate claim of entitlement, even if it later leads to a state court judgment. See Gardner, 969 F.2d at 71 n.3. Thus, the fact that Biser obtained a state court order, enforceable by that court's power of contempt, barring the Board of Appeals from denying his application for a special exception, does not mean that he had a pre-existing legal right to that special exception.[2]

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[2]To the extent that Roy v. City of Augusta, Maine, 712 F.2d 1517, 1522 (1st Cir. 1983), implies otherwise, we respectfully disagree. A state court judgment is something to be enforced through the state's judicial process, including its powers of contempt. Every state court judgment does not provide a would-be plaintiff with a cognizable property right under 42 U.S.C. §1983, and every alleged delay in the enforcement of the mandate does not provide a plaintiff with a claim of deprivation without due process of law. To hold otherwise would assign the federal courts the role of ombudsmen in monitoring the execution of statement judgments, a role Congress surely did not envision in passing this statute, and one that would be destructive of federal-state relations.

Moreover, an equitable doctrine premised on statutory ambiguity does not rise to the level of "either a certainty or a very strong likelihood that the application would have been granted," which is necessary to state a legitimate claim of entitlement. See Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985). Far from being a general rule of law whose application can be predicted, estoppel derives from a court of equity's duty to do justice, and it necessarily "depends upon the facts and circumstances in each case." Liberty Mut. Ins. Co. v. American Auto. Ins. Co., 154 A.2d 826, 828 (Md. 1959). Biser could not have anticipated at the time of his application for a special exception that a court of equity would later preclude the Board from asserting its legal right to deny that application. The equitable doctrine of estoppel thus did not give Biser a basis for believing that there was a "very strong likelihood" that his application would be granted.

IV.

Finally, we note that Biser asserted state claims based

on these same facts, for which he claims the same damages. Those claims were dismissed without prejudice, and Biser remains free to pursue them in state court. The Town of Bel Air has cross-appealed, claiming that the district court erred in dismissing Biser's state law claims, without prejudice. We find no abuse of discretion here. In fact, the district court's order of dismissal properly left a local controversy for local resolution. The Circuit Court for Harford County has already given Biser relief once, and we see no reason why the Maryland courts are now inadequate to hear his current grievances. As we emphasized in Gardner, the proper forum for local land-use disputes is state, not federal, court. 969 F.2d at 69.

For the above reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT F. BISER :

v. : CIVIL NO. Y-91-1785

TOWN OF BEL AIR, MARYLAND, et al. :

:

W. Michel Pierson, Esquire, Baltimore, Maryland, counsel for plaintiff.

Carol B. O'Keeffe, Esquire, Columbia, Maryland, counsel for defendants.

YOUNG, Joseph H., Senior District Court Judge

Date: November 27, 1991

MEMORANDUM

Defendants filed a Motion pursuant to Rule 12(b)(1), (6), and 12(c), Fed.R.Civ.P., to dismiss or in the alternative for judgment on the pleadings. A Rule 12(c) motion is inappropriate because Defendants have not filed an answer to the complaint and the pleadings are not closed, and the Court is satisfied that the complaint alleges sufficient facts to

withstand dismissal for lack of subject matter jurisdiction. The Motion will be considered under Rule 12(b)(6), Fed.R.Civ.P. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).[1]

After consideration of the pleadings, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted.

FACTS

For consideration under Rule 12(b)(6), Fed.R.Civ.P.,

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[1]Defendants contend that plaintiff has not alleged an entitlement under state law, and that such is fatal to plaintiff's claim of a deprivation of property without due process of law. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981). Defendants contend that even if plaintiff could articulate an entitlement under state law, plaintiff has received post-deprivation process and thus has not stated a claim under Section 1983. Id.

The Court is satisfied that the Complaint includes sufficient allegations to support a claim of deprivation of substantive due process. Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). Accordingly, the court will consider the instant motion on the merits pursuant to Rule 12(b)(6), Fed.R.Civ.P. Id. at 1219. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773 (1946); Calvert v. Sharp, 748 F.2d 861, 863 (4th Cir. 1984). See, generally 2A Moore's Federal Practice ¶12.16 (1982 & Supp.) and 27 Fed.Proc., L. Ed. §62:453.

the factual allegations of the Complaint will be taken at true. Those allegations show that on June 26, 1991, Plaintiff Robert F. Biser filed a Complaint, pursuant to Section 1983, Title 42, against the Town of Bel Air, Maryland, and various town employees. The complaint alleges that Defendants intentionally and maliciously deprived him of his property rights without due process of law and in violation of the Fourteenth Amendment, and of his rights under Article 24 of the Declaration of Rights of Maryland.

Plaintiff owned a tract of real property located in the Town of Bel Air. Under the Town Zoning Ordinance, the property was situated in an "R-2" (General Residence) district.[2] Plaintiff desired to use his property to construct two

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[2]The Town of Bel Air Zoning Ordinance (Ordinance No. 208, Art. 7) allows, upon approval by the Board of Appeals, the:

> conversion of a dwelling or part thereof, into the office or studio of one or more physicians, surgeons, dentists, musicians, artists, lawyers, architects, engineers,

office buildings, and met with Defendant Carol Deibel, Director of Planning and Community Development of the Town of Bel Air, in August of 1988 to discuss his planned use of the property.

Plaintiff explicitly expressed to Defendant Deibel his intention to construct commercial office buildings, and sought her assistance in obtaining final special exception approval. (Complaint ¶12). Defendant Deibel suggested that Plaintiff seek certain variances, obtain building permits, construct the buildings and then request special exceptions approval after the

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> teachers, insurance agents, real estate agents, photographers, accountants or other professionals; provided that the exterior residential appearance of the building shall be retained, that floodlighting shall be used and adequate off-street parking areas shall be provided to accommodate all personnel [sic] and patrons. The Board of Appeals may impose further conditions pursuant to §16.0443 of this Ordinance in order to protect the neighborhood, adjacent properties and community." (Motion App. A)

buildings were constructed. (Complaint ¶13). Deibel advised Plaintiff that the buildings "would have to exist" before the Board of Appeals could grant the special exception approval to permit the conversion of the buildings to office use. Id.

Plaintiff then presented his plan to the Board of Appeals on September 27, 1988. The Board did not object to Plaintiff's plans, and approved certain variances. Defendants Docken, Young and Yantz were present at that meeting. (Complaint ¶14). Plaintiff then completed plans for the building and applied for building permits in May, 1989.

The plans and application submitted with the permits unequivocally demonstrated that the buildings were designed solely for commercial use. (Complaint ¶15, Motion App. C, p. 6). The permits were issued on June 27, 1989. On the face of the permits, Plaintiff's phrase "commercial office buildings" was stricken and the term "dwellings" was inserted. No other changes were made to the permits, and Plaintiff began construction.

In August of 1989, Plaintiff sought approval of an underground storm water management facility. Plaintiff desired to complete the facility before the end of October, to avoid a three month delay over the winter months. He was advised by town employees that he would not receive final approval until the Board had granted the special exception for office buildings. Plaintiff contacted Deibel, who informed him that he could apply for a special exception approval as long as the building was "under roof" and the windows were installed prior to the Board of Appeals hearing. Plaintiff completed the necessary construction and presented his application to the Board in September, 1989. Members of the Board expressed concern that the special exception was improper because the buildings were not dwellings and, thus, a "conversion" could not take place.[3]

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[3]The issue was raised that there were no kitchens, bedrooms, or other living accommodations in the building, and no use and occupancy permits had been issued.

On September 28, 1989, two days after the hearing, Defendant Ranney, Superintendent of Public Works for the Town of Bel Air, issued a stop work order. The order stated that the structures would have to be made suitable for residential use to comply with Building Code requirements. To avoid the pending three month delay in construction, Plaintiff installed the bathroom and kitchen facilities necessary to make the structures comply with the building code. The stop work order was lifted on October 16, 1989.

Plaintiff came before the Board again on October 24, 1989. At this meeting, he stated that, in reliance on the prior representations of the Board and Mrs. Deibel, he had expended substantial amounts of money and time constructing the buildings. He admitted that the buildings did not comply with Code requirements for dwellings, and stated it would be extremely expensive to rebuild the non-conforming systems to get use and occupancy permits.

Nevertheless, the Board again denied his request for

a special exception, stating in its opinion that "at this point in time, there are no dwellings on the subject properties which can be converted to professional offices....The buildings are not complete, and Use and Occupancy Permits have not been issued." (Motion App. C, p. 4).

In an opinion dated January 26, 1990, the Circuit Court, Harford County, concluded that the Town of Bel Air and the Board of Appeals were estopped from denying the approval because of Plaintiff's reliance on Defendants' representations regarding the procedure for obtaining a special exception. The court found that the ordinance authorizing the special exception was ambiguous and capable of at least two interpretations. One interpretation would require that dwellings, with use and occupancy permits, exist prior to conversion. The second interpretation would not require use an occupancy permits, i.e. if building exteriors resemble dwellings in appearance, the special exception can be sought for immediate conversion to office use. The court remanded

the case with instructions to the Board to grant the special exception.

After the Circuit Court's decision, Plaintiff was further delayed in obtaining a special exception until May of 1990. A final use and occupancy permit was issued on October 16, 1990. (Complaint ¶30).

Plaintiff alleges that he was subjected to substantial expenses, loss of opportunity to lease the buildings, loss of good will and prospective income, bad press, emotional and mental anguish, distress and pain as a result of the delays and the Defendants' actions. Plaintiff further alleges that Defendants' conduct was arbitrary and capricious, and not reasonably related to any permissible governmental objective.

DISCUSSION

The Supreme Court has set forth three types of Section 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment. First, the Clause incorporates many of the specific protections

defined in the Bill of Rights. "A Plaintiff may bring suit under Section 1983 for a state official's violation of his rights to, e.g., freedom of speech or freedom from unreasonable searches and seizures." Zinermon v. Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983 (1990). Second, the Due Process Clause contains a "guarantee of fair procedure." Id. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Id. (citing Parratt v. Taylor, 451 U.S. 527, 537, 101 S.Ct. 1908, 1913 (1981); Carry v. Piphus, 435 U.S. 247, 259, 98 S.Ct. 1042, 1050 (1978). In such circumstances, the constitutional violation is not complete until the State fails to provide due process. Since Plaintiff has successfully obtained a special exception through post deprivation procedure, any deprivation of procedural due process, therefore, has been cured, and the Complaint fails to

state a claim of deprivation of procedural due process.

A third type of Constitutional protection actionable under Section 1983, and the one which Plaintiff relies upon in his Complaint, is substantive due process. The substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986). The right to be free from arbitrary state action is a substantive due process right that arises directly from the constitution. Regents of University of Michigan v. Ewing, 474 U.S. 214, 229-30, 106 S.Ct. 507, 515 (1985) (Powell, J. concurring). As to this type of claim, the constitutional violation actionable under Section 1983 is complete when the wrongful action is taken. The existence of state post deprivation remedies therefore has no bearing on whether the Plaintiff has stated a constitutional claim. Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986); Weller v. Department of Social Services, 901

F.2d 387, 391 (4th Cir. 1990); Gilmere v. City of Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) (en banc), cert. denied, 476 U.S. 115, 106 S.Ct. 1970 (1986). See also Fitzgerald v. Williamson, 787 F.2d 403, 408 (8th Cir. 1986) ("there are no precise standards for determining what governmental actions are proscribed by substantive due process.")

Defendants have alleged that Biser has no legitimate claim of entitlement under State Law to a special exception permit, and thus has failed to state a valid claim under Section 1983. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912 (1981). State law is not the exclusive source of constitutional rights cognizable under Section 1983. The touch-stone of due process is protection of the individual against the arbitrary exercise of the powers of government. Zinermon v. Burch, 494 U.S. 113 (1990); Daniels v. Willliams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986), concurring opinion at 106 S.Ct. 677 (1986); Monroe v. Pape, 365 U.S. 167, 173-174, 81 S.Ct. 473 (1961). Clearly Biser

may not claim an entitlement under state law to a special exception, as the decision to grant or deny a special exception is within the Board's discretion.

Plaintiff relies on the substantive component of due process. "Each new claim to [substantive due process] must be considered against a background of constitutional purpose, as they have been rationally perceived and historically developed." Regents of University of Michigan v. Ewing, supra. Though a person may be entitled to some protection against the malicious and intentional misinformation provided by government official, Plaintiff has not alleged conduct that rises to that level of a substantive due process violation. Far from abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that a loss caused by such conduct is a deprivation of property within the meaning of the Due Process Clause would trivialize the centuries old principle of Due Process law. Plaintiff pleads no facts to support his allegation that

Defendants intentionally and maliciously misdirected him on the proper procedure to follow to obtain a special exception permit. The facts alleged support the inference that Town employees simply gave varying interpretations to an ambiguous provision; but no more. At most, the way in which the Town employees handled Plaintiff's application could show bureaucratic bungling and a lack of coordination between the branches of a municipal government. Such action, or lack thereof, does not rise to the level of a substantive due process violation. Accordingly, Defendants Motion to Dismiss will be granted.

Senior United States District Judge

Supreme Court, U.S.
FILED
AUG 30 1993
OFFICE OF THE CLERK

No. 93-94

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROBERT F. BISER,
Petitioner,

v.

TOWN OF BEL AIR, MARYLAND,
CAROL L. DEIBEL, EDSEL A. DOCKEN, SR.
JAMES M. DECKER, JOHN E. YANTZ,
DONALD YOUNG AND D. DAVID RANNEY, JR.
Respondents.

Petition For Writ of Certiorari to The
United States Court of Appeals
for The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals properly held that Petitioner had no property interest under Maryland law in the grant of a special exception.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, with two exceptions. First, when Petitioner met in August, 1988, with Respondent, Carol Deibel (hereinafter, "Deibel"), the Director of Planning and Community Development for the Town of Bel Air, (hereinafter, the "Town"), Deibel reviewed Petitioner's preliminary plans for the two buildings he proposed to construct and determined that the layout of the two buildings would require setback variances from the Board of Appeals, even if he were ultimately to obtain a special exception for the commercial use he desired. App. A-4; Compl. ¶ 13. Deibel also told Biser that the buildings would have to exist before he could apply for a special exception to convert dwellings to professional office use. Id. When Petitioner appeared before the Board of Appeals on September 27, 1988, he was not applying for a special exception, as implied by the Statement of the Case in the Petition for Writ of Certiorari, (Pet. at p.4). Rather, he was applying for setback variances to construct two buildings. App. A-5; Compl. ¶ 14. The distinction is significant because Petitioner has consistently offered the fact that at the September 27, 1988 meeting the Board did not object to Petitioner's description of his plans to obtain a special exception as evidence of the Board's implied approval of those plans, thus making the Board's later denial of the special exception when it was formally under consideration "arbitrary and capricious". The reality is that Petitioner's special

exception was not before the Board on September 27, 1988, and the Board's failure to object to Biser's plans had no legal significance, whatsoever.

Second, the district court did not, as characterized in the Petition at page 8, reject "respondents' assertion that the Complaint insufficiently alleged an entitlement that qualified for due process protection." The district court stated that, "[c]learly Biser may not claim an entitlement under state law to a special exception, as the decision to grant or deny a special exception is within the Board's discretion." (Pet. at B-12-13). However, unlike the Fourth Circuit, the district court did not end its inquiry with the conclusion that no claim of entitlement to the special exception sought by Biser existed under state law, but went on to review Respondents' conduct and held that it failed to rise to the level of a substantive due process violation, (Pet. at B-14). The district court examined the factual allegations of Respondents' supposed wrongdoing and found that the facts, "support the inference that Town employees gave varying interpretations to an ambiguous provision; but no more." (Pet. at B-14).

REASONS FOR DENYING THE PETITION

Petitioner's two professional buildings now stand as a testament to the capacity of reasonable people to reach differing conclusions regarding the correct interpretation of statutes and ordinances. The Board of Appeals of the Town of Bel Air (the "Board"), whose three

members are Respondents herein, read the Zoning Regulations of the Town of Bel Air ("Zoning Regulations") to require the existence of "dwellings" in compliance with the Town's building code before a special exception could be granted to convert the dwellings into professional offices. Petitioner's buildings did not meet the building code requirements for dwellings, so the Board denied his special exception request. The Circuit Court for Harford County, Maryland found the Zoning Regulations susceptible of another interpretation and ordered the Board to issue the special exception. Such disagreements are the genesis of the multitude of zoning decisions which make their way to the state courts each year. State judicial review of zoning decisions is provided pursuant to the statutory framework of the Model Zoning Act which has been, in some form, universally adopted in the fifty states. Charles A. Rathkopf, The Law of Zoning and Planning §1.01, p. 1-17 (4th Ed.).

Beginning with the admonition in Village of Belle Terre v. Boraas, 416 U.S. 1, 12 (1974), that a federal court "should not . . . sit as a zoning board of appeals," this Court's precedents have served to underscore the First Circuit's observation that "run of the mill dispute[s] between a developer and a town planning agency" are primarily matters of state concern and do not "implicate the Constitution." Creative Environments Inc. v. Estabrook, 680 F.2d 822, 833 (1982). The Fourth Circuit viewed this case as just such a run of the mill development

dispute properly left for local resolution. Biser v. Town of Bel Air, 991 F.2d 100, 105 (4th Cir. 1993). It properly affirmed the district court's determination that Biser's grievance against the Town of Bel Air, its employees and the members of its Board of Appeals did not rise to the level of a substantive due process violation under the Fourteenth Amendment.

I. THE DECISION BELOW CORRECTLY APPLIED THIS COURT'S CONTROLLING PRECEDENT IN HOLDING THAT THE EXERCISE OF DISCRETION IN GOVERNMENTAL LAND USE DECISIONS DEFEATS A SUBSTANTIVE DUE PROCESS CLAIM.

Petitioner challenges the Fourth Circuit's focus on the element of discretion as the determinant of whether a property interest in the grant of a special exception exists under Maryland law so as to trigger Fourteenth Amendment Due Process protections. Petitioner notes that most zoning decisions involve the exercise of discretion and to hold that the presence of governmental discretion in zoning matters vitiates any ability to establish the property interest requisite to a due process claim removes an entire class of interests from the protection of the Due Process Clause.

The answer to Petitioner's charge is found in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the decisions which marked a turning point in both procedural and substantive due process analysis. This Court observed in Roth that:

> "the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning."

Roth at 572. This Court proceeded to give meaning to the concept of property by explaining that:

> "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

Roth at 577. The Court pointed to State law and other rules or understandings as the source upon which a claim of entitlement to a benefit must rest.

The claim of entitlement standard enunciated in Roth has guided the First[1], Second[2], Fourth[3], Sixth[4], Seventh[5], Eleventh[6] Circuits and,

[1] Roy v. City of Augusta, Maine, 712 F.2d 1517, 1522 (1st Cir. 1983).

on occasion, the Eighth[7] Circuit in their analyses of both procedural and substantive due process challenges to property specific governmental land use decisions (sometimes referred to as quasi-legislative or administrative decisions)[8]. That analysis begins with the irrefutable logical premise that a person who claims that he was deprived of liberty or property without the process guaranteed by the Fourteenth Amendment must first identify the affected liberty or property interest.

The Due Process Clause has served the historical role of safeguarding citizens from arbitrary or oppressive actions and deliberate

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[2] RRI Realty Corp., Inc. v. Village of Southampton, 870 F.2d 911, 918 (2nd Cir. 1989); Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2nd Cir. 1985).

[3] Gardner v. City of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992); [3]Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983).

[4] Silver v. Franklin Township Bd. of Zoning Appeals, 966 F.2d 1031, 1035-1036 (6th Cir. 1992).

[5] Swartz v. Scruton, 964 F.2d 607, 609 (7th Cir. 1992).

[6] Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989).

[7] Carolan v. City of Kansas City, MO., 813 F.2d 178, 181 (8th Cir. 1987).

[8] See, e.g., discussion of the legislation/administrative distinction and its implications for due process analyses in Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220 (6th Cir. 1992).

abuses of governmental authority. Hurtado v. People of State of California, 110 U.S. 516 (1884). But this Court has been ever mindful that the substantive component of the Due Process Clause is the result of judicial interpretation and that the history of Due Process Clause "counsels caution and restraint." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 502 (1977) (opinion of Powell, J., for a plurality). Thus, the "claim of entitlement" inquiry provides a textual basis for one strand of substantive due process analysis and serves to limit the protections of the Due Process Clause to those interests which are deemed property, or a species of property, under state law.

The analytical framework of Roth for procedural due process claims was extended in Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985). The Court assumed the existence of Ewing's property interest in a six-year program of study culminating in an undergraduate degree and medical degree in evaluating his substantive due process challenge to dismissal from the program. The procedural posture of Ewing is analogous to the type of property specific land use decision that comprises the vast majority of governmental zoning actions, i.e., the

challenge was to a particular decision, rather than to an entire legislative scheme. The earlier substantive due process challenges to land use regulations tended to be direct attacks on the validity of the legislative zoning enactment, itself, which survived challenge unless judicially deemed "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926). Legislative land use schemes still come under substantive due process challenge from time to time,[9] but the greater number of substantive due process attacks on land use decisions are directed to governmental denials of rezonings, variances, special exceptions, subdivision, etc., – all of which require the exercise of discretion.

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[9] See, Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667 (3rd Cir. 1991) ("rational basis" test of Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955) used in reviewing a challenge to a dance hall licensing scheme which gave great weight to police department approval and neighborhood opposition in the decision making process); and Southview Assoc. Ltd. v. Bongartz, 980 F.2d 84 (2nd Cir. 1992) (substantive due process challenge to a Vermont environmental law designed to protect deeryards which significantly reduced the developer's buildable area of the developer's property).

The focus on the element of discretion as a means of determining whether the land use applicant has a property interest derived from a legitimate claim of entitlement is the inevitable logical byproduct of this Court's terminology. "Entitlement" connotes something akin to a legal right. The concept of "right" is incompatible with an exercise of discretion, a function involving latitude of judgment.

The law of mandamus provides insight into the extent to which the exercise of discretion in the grant of a governmental approval removes the required approval from the category of legal rights which can be compelled by order of court. The writ of mandamus has been the historical vehicle for compelling corporations, inferior tribunals or public officers to perform their duties. George's Creek Coal & Iron Co. v. Allegheny County Comm'rs., 59 Md. 255, 259 (1883). The party applying for the writ must establish a clear legal writ to the requested action. Id. The writ will be held if the duty sought to be compelled is discretionary or requires the exercise of judgment. This Court has consistently held that the interpretation of a statute involves an exercise of judgment which cannot be controlled by mandamus. Panama Canal

Co. v. Grace Line, 356 U.S. 309 (1958); Wilber v. United States, 281 U.S. 206 (1930). Most zoning applications and land use decisions involve an interpretation of the controlling land use regulation or ordinance. Thus, it is appropriate that the exercise of discretion required in interpreting and applying land use regulations would defeat a claim of entitlement.

Petitioner is correct that the Roth entitlement, focused as it is on the presence or absence of discretion by the local land use regulation will relegate many, if not most, substantive due process challenges to disposition by motion to dismiss or summary judgment[10].

But the limiting effect of the "claim of entitlement" analysis does not result from the focus on the range of discretion exercised in the challenged regulatory decision as the principal criteria for determining the existence of a property interest subject to due process protection. It

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[10] At least the Second Circuit and the Fourth Circuit have straightforwardly acknowledged that their analysis of entitlement serves the salutary purpose of preventing federal courts from becoming zoning boards of appeals. See, e.g., RRI Realty Corp. v. Village of Southampton, supra, at 918; Gardner v. Baltimore Mayor and City Council, supra, at 67.

is the threshold requirement that a property interest is a requisite to substantive due process claim that proves to be the proverbial "eye of the needle" through which many claims do not pass. However, that threshold requirement derives from adherence to this Court's guidance in Roth, Perry, and Ewing. Had this Court meant to limit the applicability of Roth and Perry to procedural due process claims, the presence of a cognizable property interest would not have been assumed in Ewing.

> We therefore accept the University's invitation to 'assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment,'[Fn. 8] and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of the record disclose no such action.

Id. 474. U.S. at 223.

The application of the property interest requirement is viewed by some commentators as an unwarranted restriction on the historical function of the substantive due process component of the Fourteenth Amendment. See, e.g., J. Michael McGuinness and Lisa A. McGuinness Parlegreco, The Reemergence of Substantive Due Process As a Constitutional Tort: Theory, Proof, and Damages, 24 New Eng.

L. Rev., 1129, 1133-35 (1990). However, the concern is misplaced. The Due Process and Equal Protection Clauses of the Fourteenth Amendment remain as guardians against arbitrary governmental conduct which infringes on fundamental interests. Even absent a cognizable property interest, a substantive due process challenge to the withholding of a governmental approval may be premised on the charge that the denial infringed other constitutionally protected interests. Perry, 408 U.S. at 597. The Fourth Circuit eschewed the property interest analysis for substantive due process purposes when it recognized an individual's right to governmental decisions which are free from irrational, religious bias in Marks v. City of Chesapeake, 883 F.2d 308 (4th Cir. 1989). Thus the unduly "crabbed" approach which Petitioner believes the Fourth Circuit has taken to substantive due process challenges in the land use arena is simply not supported by a fair reading of the decisional law of the Circuit.

This narrowed federal focus is entirely consistent with this Court's delineation of the narrow scope of federal review in substantive due process claims. Ewing, 474 U.S. at 227. The Court's expressed reluctance to "trench on the prerogatives of state and local institutions in

the area of academia,"[11] and personnel decisions[12] is echoed by the Fourth Circuit's similar reluctance in Gardner to enter the arena of land disputes:

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what "has always been an intensely local area of the law." Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 839, 839 (1983).

969 F.2d at 67. The standard for determining the existence of a property interest which Petitioner challenges does not merit review because it is consistent with this Court's controlling precedent and the weight of authority in the circuits.

Petitioner also claims that the Fourth Circuit's examination of the potential sources of a property interest was unduly restricted to the Town's Zoning Regulations, thus ignoring Respondents' conduct as a possible source of a protected property interest. Petitioner points to the fact that the Circuit Court for Harford County held that Respondents were equitably estopped by their conduct from denying Petitioner's special exception as the non-statutory source of a property interest.

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[11] Ewing, 474 U.S. at 226.

[12] Bishop v. Wood, 426 U.S. 341, 349 (1976).

The Fourth Circuit considered but rejected Petitioner's argument as unfounded in Maryland law. "Estoppel does not, however, give rise to any affirmative duties." Biser v. Town of Bel Air, 991 F.2d 100, 104 (1993), citing Leonard v. Sav-A-Stop Services, Inc., 289 Md. 204, 424 A.2d 336, 339-40 (1981). Thus, the Fourth Circuit did not confine its inquiry to an examination of the discretionary character of a special exception (sometimes referred to as a "conditional use") in Maryland and, particularly, in the Town's Zoning Regulations. Mindful of this Court's comment that property interests meriting due process protection are not "limited by a few rigid technical forms",[13] the Fourth Circuit evaluated Petitioner's asserted property interest by equitable estoppel, but found no source for that interest in Maryland law. In Ewing, 474 U.S. at 224 this Court reiterated that property interests based on "mutually explicit understandings" must be derived from an independent source, such as state law. Similarly, a property interest created by equitable estoppel must stem from Maryland law.

[13] Perry, 408 U.S. at 601.

II. THIS CASE DOES NOT MERIT THE COURT'S ATTENTION AS A VEHICLE FOR DEFINING THE APPROPRIATE STANDARD OF FEDERAL REVIEW IN SUBSTANTIVE DUE PROCESS CHALLENGES TO LAND USE DECISIONS.

Petitioner maintains that this case warrants review because of the divergence of approaches among the circuits in substantive due process challenges to land use decisions, citing Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992), in which the Sixth Circuit surveyed the supposedly diverse approaches of the circuits. Assuming, arguendo, that the circuits would benefit from guidance in this area and that Petitioner could establish a property interest sufficient to invoke Fourteenth Amendment protection, there is no reason for the Court to review this case. Petitioner's Complaint did not describe conduct that would qualify as a substantive due process violation under this Court's standards or the standards of any of the circuits, and the district court so held.

The district court granted Respondents' motion to dismiss, after noting that it was satisfied that the Complaint contained sufficient "allegations to support a claim of deprivation of substantive due process," (Pet. at B-2) although Respondents had argued that Petitioner's lack of entitlement to a special exception under Maryland law defeated his § 1983 claim as a threshold matter. The district court did not find Petitioner's lack of entitlement to a special exception fatal to his due

process claim.[14] The district court considered the pending motion to dismiss on the merits. The facts alleged in the Complaint were taken as true, examined in detail and measured against the enunciates of Zinermon v. Burch, 494 U.S. 113 (1990), Daniels v. Williams, 474 U.S. 327, 331 (1986) and Monroe v. Pape, 365 U.S. 167, 173-174 (1961) that the Due Process Clause stands as a bulwark against the arbitrary exercise of the powers of government regardless of how procedurally fair the exercise of power. Simply put, the district court rejected Petitioner's contention that the conduct of the employees and officials of the Town of Bel Air rose to the level of a substantive due process violation, (Pet. at B-13). The District Court viewed the allegations of the Complaint to describe governmental behavior which resulted from varying interpretations of an ambiguous zoning regulation, at most amounting to a lack of due care, (Pet. at B-13). The district court declined[15] to trivialize the "centuries old principle of Due Process law" by evaluating "bureaucratic bungling"

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[14] The Fourth Circuit had held in Scott v. Greenville County, 716 F.2d 1409 (4th 1983), that substantive due process analysis must begin with an identification of a property interest rooted in State law, but its decision in Marks v. City of Chesapeake, 883 F.2d 308 (1989) departed from that analytic approach. However, in Gardner v. Baltimore Mayor and City Council, 969 F.2d 63 (1992), the Fourth Circuit unequivocally held that a cognizable property interest is an essential element of a substantive due process claim and that any significant element of discretion in the grant or denial of a zoning application or land use approval vitiates the claim of entitlement which is an essential requisite of a property interest under Roth.

[15] As did this Court in Daniels v. Williams, 474 U.S. 327, 332 (1986).

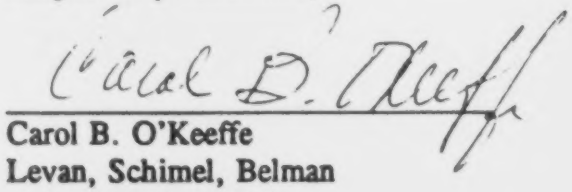
to a violation of the Fourteenth Amendment. Id. This holding was consonant with the Sixth Circuit's careful exposition of the difference between the terms "arbitrary and capricious" for purposes of state court review of administrative land use decisions and the meaning of those terms for purposes of federal review. Although acknowledging that the "shocks the conscience" terminology is perhaps more apt in cases involving physical force, the Sixth Circuit, nevertheless, accepted that standard in land use cases as a useful reminder that, "arbitrary" and "capricious" in the federal substantive due process context means something far different than in state administrative law. Pearson, 961 F.2d at 1222. The district court's ratio decidendi in the instant case was also consistent with this Court's pronouncement that a substantive due process violation requires more than a lack of due care. Daniels v. Williams, supra, at 329.

There is little point for this Court to review the standards employed for determining the existence of a property interest in the context of land use decisions only to reach an examination of conduct of Town officials and employees which is remote from the historical embrace of substantive due process protections.

CONCLUSION

For the aforegoing reasons, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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18PL4153.PCN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT F. BISER :
2318 Turner Lane
Bel Air, Maryland :

Plaintiff :

v. :

TOWN OF BEL AIR, MARYLAND :
SERVE ON TOWN ADMINISTRATOR
William H. McFaul :
39 Hickory Avenue
Bel Air, Maryland 21014 :

CAROL L. DEIBEL, :
708 Churchville Road
Bel Air, Maryland 21014 :

D. DAVID RANNEY, JR. :
705 Churchville Road
Bel Air, Maryland 21014 :

EDSEL A. DOCKEN, SR., also known as : Civil No.
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:

JAMES M. DECKER
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Bel Air, Maryland, 21014
:

JOHN E. YANTZ
705 Churchville Road :
Bel Air, Maryland 21014

DONALD YOUNG
705 Churchville Road
Bel Air, Maryland 21014

Defendants

COMPLAINT

Robert Biser, plaintiff, by his attorney, W. Michel Pierson, for complaint states:

1. This is an action arising under section 1983 of Title 42 of the United States Code, to redress the deprivation under color of state law of plaintiff's property rights, without due process of law, by the Town of Bel Air and its employees. Jurisdiction is conferred upon this court by Title 28, §1343 of the United States Code. Plaintiff's right not to be deprived of property without due process is protected by the Fourteenth Amendment, of the United States Constitution.

2. This court also has pendent jurisdiction over claims arising under the law of the state of Maryland, because these claims are based upon the same common nucleus of operative fact as those on which the claims under 42 U.S.C. §1983 are based.

3. Plaintiff Robert Biser is a citizen of the united States and the state of Maryland, residing at 2318 Turner Lane, Bel Air, Harford County, State of Maryland. Since 1978, Plaintiff has owned and operated Biser Construction Company,

a sole proprietorship, also located at 2318 Turner Lane, Bel Air, Harford County, State of Maryland.

4. Defendant, Town of Bel Air, is a municipal corporation duly organized and existing under the laws of the State of Maryland, located in Harford County.

5. At all times hereinafter mentioned, defendant Carol L. Deibel was the Director of Planning and Community Development of the Town of Bel Air.

6. At all times hereinafter mentioned, defendant D. David Ranney, Jr., was the superintendent of Public Works of the Town of Bel Air.

7. At all times hereinafter mentioned, defendant Edsel A. Docken, Sr., also known as Dean Docken, was the Assistant Planner of the Town of Bel Air.

8. At all times hereinafter mentioned, defendants James M. Decker, John E. Yantz and Donald Young were members of the Board of Appeals of the Town of Bel Air. The Board of Appeals is empowered among other things, to permit special exceptions to the Town zoning ordinance.

9. At all times described herein, the individual defendants were acting within the scope of their employment, and were acting pursuant to the official policy of the Town of Bel Air. At all times hereinafter mentioned, defendants were acting under color of the law of the state of Maryland.

10. At all times relevant hereto, plaintiff was the owner of a tract of real property located at the corner of Vale Road and Rockspring Avenue in the Town of Bel Air, Maryland.

11. Under the Town Zoning Ordinance effective in 1988, the property was situated in an "R-2" (General Residence) district of the Town of Bel Air. Properties in such a district were restricted to residential use, except that residential structures could be converted to professional office use through approval of a special exception by the Board of Appeals.

12. Plaintiff desired to build two office buildings on the property and developed preliminary plans for such a project. In August, 1988, plaintiff met with defendant Deibel to determine if his desired use of the property was permissible. Plaintiff presented his preliminary plans to defendant Deibel and expressed his intention to build two office buildings on the property. Plaintiff explicitly expressed to defendant Deibel that he wanted to build commercial office buildings, and sought defendant Deibel's recommendations regarding obtaining final special exception approval.

13. Deibel reviewed the preliminary plans, and determined that the layout of the buildings required setback variances. Therefore, defendant Deibel suggested that plaintiff first seek the setback variances, obtain building permits, construct the buildings and then request special exception

approval after the buildings were constructed. Defendant Deibel advised plaintiff that the buildings would have to exist before the Board of Appeals would grant the special exception approval to permit the "conversion" of the buildings to office use.

14. To obtain confirmation that this approach for obtaining zoning approval was in fact correct and permissible, plaintiff presented his plans and a rendering of the completed office buildings at a meeting of the Board of Appeals on September 27, 1988. Defendants Docken, Young, and Yantz were present at that meeting. Plaintiff expressly declared his plans for development and his desire to ascertain if any impediments existed before commencing construction. At that meeting, the Board did not object to the plans presented by plaintiff, and approved the setback variances.

15. In reliance on the approval by the Board of Appeals of the variances and its acquiescence with regard to plaintiff's long term proposal, plaintiff completed the building plans and applied for building permits in May 1989. The plans and application stated that the structures were to be commercial office buildings.

16. The application and plans were filed with defendant Docken. Without explaining his actions to plaintiff, defendant Docken struck out the references to the buildings as "commercial office buildings" and changed these references to

"dwellings". The building permit applications were then processed and approved.

17. Pursuant to the requirements for office buildings, plaintiff prepared and submitted a landscape plan. Such a landscape plan is not required for residential dwellings,. Plaintiff's plan was forwarded to the Appearance and Preservation Committee for review. The Committee approved the landscape plans. Based upon this as well as a review of the application, building permits were issued on June 27, 1989.

18. In reliance upon the issuance of building permits, plaintiff began construction of the buildings.

19. In August 1989, after substantial construction had been undertaken, plaintiff sought finalized approval of the storm water management plans. Final approval was required in order to install the underground storm water management facilities, which had to be finished before the parking lot on the property could be paved. Due to the nature of this type of underground work, plaintiff wished to complete the storm water management facilities during the fall in order to avoid a delay of several months in completing this work. Plaintiff was advised by employees of defendant Town that the storm water management plans would not be finally approved until the Board of Appeals had granted the special exception for the office buildings.

20. Therefore, plaintiff contacted defendant Deibel in late August 1989 to ascertain what plans and construction on the buildings he had to complete to obtain approval for the special exception. In soliciting this information, Plaintiff advised defendant Deibel of the reason why plaintiff needed to receive approval for the special exception as soon as possible, and the resulting problems if the construction was delayed.

21. Defendant Deibel advised that plaintiff could apply for the special exception approval as long as the building wa "under roof" and the windows were installed prior to the Board of Appeals hearing.

22. In reliance on this advice, plaintiff filed the application for the special exception approval, and completed the necessary construction on the buildings prior to the meeting of the Board of Appeals on September 26, 1989.

23. Plaintiff presented his application to defendants Yantz, Young and Decker at the September 29, 1989 meeting. Defendant Docken was also present at the meeting. Plaintiff explained that this project was the same as had been presented to the Board in 1988 and the building had been constructed consistent with the plans shown to the Board at said meeting. The Board of Appeals did not issue a decision.

24. On September 28, 1989, defendant Ranney issued a stop work order to Plaintiff. The stated basis of the stop work order was the failure of buildings to comply with the

requirements of the Building Code related to single family dwellings. The order stated that the structures would have to be corrected to be suitable for residential use.

25. Plaintiff protested the stop work order and pointed out his reliance on the prior approval of his plans. Defendants Ranney and Deibel, however, refused to rescind the order.

26. Because of the lengthy and costly delay that would otherwise be entailed, plaintiff had no choice other than to comply with defendant Ranney's requirements. Accordingly, plaintiff revised the plans and installed bathroom and kitchen facilities as required by the stop work order. As the result of these changes, the stop work order was lifted on October 16, 1989.

27. The Board of Appeals met again on October 24, 1989 to consider plaintiff's application. Plaintiff again presented his application, outlining the changes to the plans and the work he had completed on the building in order to comply with the stop work order. Plaintiff presented evidence to show reliance, to his detriment, upon the prior information and approvals received from the Board of Appeals, Bel Air, and their respective employees regarding the construction of the buildings. This reliance included substantial monies and time expended by plaintiff in constructing his buildings. The Board of Appeals denied the request for a special exception.

28. Plaintiff filed an appeal to the Circuit Court for Harford County, challenging the Board's denial of the request for a special exception. On appeal, the court concluded that the Town of Bel Air and the Board of Appeal were estopped from denying the approval because of plaintiff's reliance on defendants' representations regarding the procedure for obtaining a special exception. The court concluded that the Board erred in denying the special exception and remanded the case with instructions to grant the special exception.

29. After the action of the Circuit Court, plaintiff was further delayed by defendants in obtaining the necessary approvals to complete his construction. Defendants repeatedly imposed additional requirements and created new impediments to completion of the project. Defendants attempted to require plaintiff to construct sidewalks and widen Vale Road, although these requirements were inconsistent with the site plan previously submitted. Defendants delayed approval of the storm water management plan. Defendants attempted to require alteration to the parking lot.

30. As a result of these requirements, plaintiff could not obtain approval of the construction until May 1990. A final use and occupancy permit was not issued until October 16, 1990.

31. Plaintiff was subjected to substantial additional expenses as a proximate result of delays caused by defendants'

conduct, including additional construction costs, attorneys fees and carrying costs. Plaintiff lost opportunities to lease the building, depriving him of substantial income. Defendants' conduct also proximately caused plaintiff to undertake additional work on the buildings, which resulted in greater and unnecessary expense.

32. Plaintiff suffered additional losses of good will and prospective income as a proximate result of the delays caused in completion of the construction, as well as the bad press created by the circumstances surrounding plaintiff's obtaining approvals and permits.

33. Plaintiff suffered emotional and mental anguish, distress and pain as a result of the actions of defendants.

34. Defendants' actions in denying plaintiff a special exception and in halting, delaying and impeding construction and completion of the project were arbitrary and capricious, were without rational basis, were not rationally related to any permissible governmental objective, and were not founded in any legal requirements.

35. On or about March 31, 1990, plaintiff made claim with the Town for damages suffered as a result of defendants' actions, which claim has not been allowed.

COUNT I

36. Plaintiff adopts and incorporates paragraphs 1 through 35 of this complaint.

37. By their actions, defendants deprived plaintiff of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

38. As a result of such deprivation, plaintiff incurred damages as herein alleged.

WHEREFORE, plaintiff demands judgment:

A. For compensatory damages against all defendants in the sum of $1,000,000.00.

B. For punitive damages against the individual defendants in the sum of $1,000,000.00;

C. For an award of plaintiff's costs and reasonable attorneys' fees;

D. For such other and further relief as the court deems proper.

COUNT II

39. Plaintiff adopts and corporations paragraphs 1 through 36 of this Complaint.

40. By their actions, defendants deprived plaintiff of his rights under article 24 of the Declaration of Rights of Maryland.

41. As a result of such deprivation, plaintiff incurred damages as herein alleged.

WHEREFORE, Plaintiff demands judgment:

A. For compensatory damages against the individual defendants in the sum of $1,000,000.00;

B. For punitive damages against the individual defendants in the sum of $1,000,000.00;

C. For such other and further relief as the court deems proper.

COUNT III

42. Plaintiff adopts and incorporates paragraphs 1 through 41 of this complaint.

43. The individual defendants intentionally and maliciously denied and interfered with plaintiff's property rights, without legal justification, and abused their powers in interfering with plaintiff's rights.

44. Defendants' actions were done for improper motive, and were done knowingly and deliberately.

WHEREFORE plaintiff demands judgment;

A. For compensatory damages in the sum of $1,000,000.00;

B. For punitive damages in the sum of $1,000,000.00; and

C. For such other and further relief as the court deems proper.

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